# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL E. STAHL,

Defendant-Appellant.

UNPUBLISHED
March 27, 2003

No. 234937
Wayne Circuit Court
LC No. 00-010768

Before: Murphy, P.J., and Markey and R.S. Gribbs*, JJ.

PER CURIAM.

Defendant Michael Stahl was convicted after a bench trial of third degree home invasion, MCL 750.110a(4), with the underlying misdemeanor of malicious destruction of property. He was sentenced as a fourth habitual offender, MCL 769.12, to four to twenty-four years' imprisonment. We reverse defendant's conviction.

Defendant first argues that he was not provided proper notice to defend against the crime of malicious destruction of property. We agree. A defendant must have notice of a crime for which he is charged before he may be convicted of it. *People v Ora Jones*, 395 Mich 379, 388; 236 NW2d 461 (1975), overruled in part on other grounds in *People v Cornell*, 466 Mich 335, 367; 646 NW2d 127 (2002). To deprive the defendant of notice violates his due process rights. *People v James*, 142 Mich App 225, 230; 369 NW2d 216 (1985).

The information charged defendant with first degree home invasion with the underlying felony of felonious assault. Defendant was convicted of third degree home invasion, with the underlying misdemeanor of malicious destruction of property after the prosecutor during closing argument requested that the judge consider that lesser crime. To convict a defendant of a crime containing an underlying felony or misdemeanor, the prosecutor must prove all elements of both crimes beyond a reasonable doubt. See *People v Sanders (On Remand)*, 190 Mich App 389, 392; 476 NW2d 157 (1991).

The crime defendant was convicted of – third degree home invasion with the underlying misdemeanor of malicious destruction of property – was completely unrelated to the underlying charged crime of felonious assault. The main crime of home invasion was all the two crimes had

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

in common. See *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993). Defendant had no notice of the crime of which he was convicted; thus, his due process rights were violated.[1]

Moreover, insufficient evidence existed to convict defendant of malicious destruction of property. Malicious destruction of property is a specific intent crime. To convict, the trier of fact must find a specific intent to injure or destroy property. *People v Culp*, 108 Mich App 452, 458; 310 NW2d 421 (1981). Although intent can be inferred from the circumstances, it can only be inferred from facts that are established beyond a reasonable doubt. *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985). It must also be proven that defendant "willfully" and "maliciously" destroyed the property. MCL 750.377a.

The uncontroverted testimony established that defendant ran frantically around the complainant's apartment, and that while defendant was in the kitchen rummaging through drawers, the complainant heard glass break. Although the complainant later discovered that a drinking glass had been broken, no one saw or testified how the glass got broken. Hence, there was no evidence that defendant had the specific intent to break the glass or that he broke it maliciously or willfully. The mere fact that defendant broke glassware was insufficient evidence to convict defendant of malicious destruction of property.

Defendant also argues that he presented evidence that he was under duress when he pushed his way into his neighbor's apartment and that the prosecution did not disprove it. Thus, the trial judge erroneously rejected his duress defense. We agree. When reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Duress is an affirmative defense that a defendant invokes to explain that he was compelled to commit a criminal act because of being threatened with serious conduct such that his free will was overcome. *People v Luther*, 394 Mich 619, 622-623; 232 NW2d 184 (1975). To raise the defense successfully, the defendant must produce "some evidence from which the

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[1] Assuming without deciding and giving defendant the benefit of the doubt that third degree home invasion with the underlying offense of malicious destruction of property *is* a cognate lesser offense of first degree home invasion with the underlying offense of felonious assault, we note that our decision to reverse defendant's conviction is supported further by the recent decisions in *Cornell, supra*, and *People v Alter*, ___Mich App ___; ___NW2d ___ (Docket No. 228005, issued January 24, 2003), slip op pp 3-4. In *Cornell*, our Supreme Court reasoned that the statute on lesser offenses, MCL 768.32(1), does not authorize consideration of cognate lesser offenses. *Alter, supra*. In the instant bench trial, defense counsel appears to have objected to the trial court's consideration of the lesser offense of third degree home invasion with malicious destruction of property on the basis of lack of intent. Following the trial court's conviction of defendant of the lesser offense, the court treated defendant's objection as an improper notice claim. Because the instant case was pending on appeal when *Cornell* was decided and the issue was preserved below and raised on appeal (albeit in an improper notice claim rather than in an erroneous jury instruction claim), we believe that *Cornell* controls. *Cornell, supra* at 367; *Alter, supra*, slip op p 4.

jury can conclude that the essential elements of duress are present." *People v Lemons*, 454 Mich 234, 246; 562 NW2d 447 (1997), quoting CJI2d 7.6, *commentary*.

> The elements of duress require a showing that
>
> (a) [t]he threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm; (b) [t]he conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant; (c) [t]he fear or duress was operating upon the mind of the defendant at the time of the alleged act; and (d) [t]he defendant committed the act to avoid the threatened harm. [*Lemons*, *supra* at 247.]

Once a defendant successfully raises the defense of duress, the prosecution has the burden to show beyond a reasonable doubt that the defendant did not act under duress. *People v Terry*, 224 Mich App 447, 453-454; 569 NW2d 641 (1997).

Defendant did not testify. He did, however, present evidence through a prosecution witness that he entered the complainant's apartment because he believed he was being chased by a man with a gun. Where a defendant does not testify, the judge must accept the testimony of the prosecution's witnesses. See *People v Juillet*, 439 Mich 34, 61; 475 NW2d 786 (1991)(Brickley, J.). Certainly, such a scenario would satisfy the elements of duress. Hence, defendant put forth "some evidence" from which the trier of fact could have concluded that the elements of duress were present. *Lemons*, *supra* at 247.

This evidence caused the burden to shift to the prosecution to show that defendant did not act under duress. *Terry*, *supra* at 453-454. Here, the prosecution produced no evidence to disprove the duress defense. At the conclusion of the trial, the trial judge merely stated that defendant's duress defense did not "raise a reasonable doubt" in her mind. Instead of accepting as required the testimony that defendant stated a gunman was chasing him, the judge used an incorrect standard – reasonable doubt – to assess defendant's defense. The record clearly demonstrates that the prosecutor did not sufficiently rebut defendant's claim of duress.

Last, defendant argues that his right to effective assistance of counsel was violated when his attorney failed to brief the court on the initial pivotal issue that defendant was not on notice to defend against the charge of malicious destruction of property. We agree. To succeed on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance "was below an objective standard of reasonableness under prevailing professional norms" and "that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Additionally, defendant must show that the "attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). This inquiry is a "mixed question of fact and . . . law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court "must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* The trial court's factual findings "are reviewed for clear error," while constitutional claims are reviewed de novo. *Id.*

When the trial judge convicted defendant of malicious destruction of property despite there having been no formal charge of that crime, she told defense counsel that he could submit a brief on whether defendant was on notice that he would have to defend against the uncharged crime. Counsel never submitted a brief. Because defendant was not on notice, his attorney's failure to educate the court on a matter that should have completely changed the outcome of the trial constituted representation below an objective standard of reasonableness. This failure ensured that the "attendant proceedings were fundamentally unfair or unreliable." Thus, defendant's right to effective assistance of counsel was violated.

We reverse defendant's conviction and vacate his sentence.

/s/ Jane E. Markey
/s/ Roman S. Gribbs